

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

60 MAY 12 07 10 46

IN RE: COMPLAINT OF DISCOUNT)
COMMUNICATIONS AGAINST)
BELLSOUTH)
TELECOMMUNICATIONS, INC.)
)

DOCKET NO. 00-00230

CONSUMER ADVOCATE DIVISION'S POST-HEARING BRIEF

Comes the Consumer Advocate Division, pursuant to the request of the Tennessee Regulatory Authority ("TRA"), and hereby files its Post-Hearing Brief. In this Brief, the Consumer Advocate Division will address two issues: (1) whether the \$3.50 state credit for Lifeline service should be passed through to resellers (the total Lifeline credit is \$10.50, from state and federal sources; of this \$10.50, only the state credit of \$3.50 is in dispute in this case); and (2) whether BellSouth should be required to offer free, truly voluntary toll blocking, including the blocking of directory assistance, to Lifeline customers.

The Consumer Advocate Division's position on these issues is: (1) the \$3.50 state credit for Lifeline should be passed through to resellers; and (2) BellSouth should be required to offer free, truly voluntary toll blocking, including the blocking of directory assistance, to Lifeline customers. Failure of the Tennessee Lifeline program to meet both of these standards would put continued federal funding of the program at risk.

POSTED
5/12/02

THE LIFELINE ISSUE

I.

THE POLICY OF MAKING TELEPHONE SERVICE MORE AFFORDABLE TO LOW INCOME PERSONS IS BEST SERVED BY PROVIDING RESELLERS WITH THE \$3.50 STATE CREDIT INTENDED FOR LIFELINE CUSTOMERS

The United States is committed to providing universal telephone service to all its citizens, ensuring that telephone service is available to everyone, rich and poor, rural and urban, at an affordable price. This commitment to "Universal Service" is clearly expressed in Paragraph 333 of the Federal Communications Commission's Universal Service Report and Order, 97-157, May 8, 1997, which provides as follows:

"Our authority to alter the existing low-income assistance programs must be understood in light of our general authority to preserve and advance universal service under Section 254."

The Lifeline program, which provides federal and state funds for the purpose of reducing the cost of telephone service for low income persons, is part of the universal service effort. The state portion of the Lifeline credit is currently \$3.50.

In the present case involving Discount Communications, Inc. and BellSouth Telecommunications, Inc., the Tennessee Regulatory Authority is confronted with an issue that squarely impacts the affordability of telephone service for low income persons. The issue is whether BellSouth will pass through the \$3.50 from the state credit for Lifeline customers who receive service from a "reseller" of telephone service such as Discount (a reseller is a company that purchases telephone services from a company such as BellSouth at a discount fixed under state law and then resells that service to its customers).

BellSouth states that it has no obligation to pass through the \$3.50 from the state Lifeline fund. Discount, a reseller, states that it has a right to the \$3.50.

The Consumer Advocate Division supports the Discount position, but it does so on behalf of Lifeline Customers, not on behalf of Discount. For the Consumer Advocate Division, this case is something more than a dispute between two companies over who has to pay, or who receives, the \$3.50 state credit. For the Consumer Advocate Division, the focus in this case should be on ensuring that the Lifeline customer gets all available credits, including the \$3.50 state credit. In the present case, under the law as it exists, this means that BellSouth should pass the \$3.50 credit through to Discount.

To see why this is so, it is necessary to look at (1) the way the state credit is set up and (2) federal law governing the allocation of Lifeline funds.

II.

THE \$3.50 PORTION OF LIFELINE SUPPORT HAS ALREADY BEEN PAID BY BELLSOUTH RATEPAYERS AND IS NOT BELLSOUTH'S MONEY TO WITHHOLD

Tennessee has provided a state contribution to the Lifeline program since 1991. Testimony of Archie Hickerson, Hearing Transcript Vol. I at 129, April 11, 2000. This state contribution has been, and continues to be, funded by the rates paid by the customers of incumbent local exchange companies:

Q. Is the cost of the \$3.50 credit, state credit, built into BellSouth's rates in your opinion?

A. Yes. Because in '93 when we set rates, we set rates based on the revenue that was being collected from the Lifeline customers. And that would have been reflected at \$3.50 less than they --- than a normal non-Lifeline customer would have paid.

Hickerson Testimony, Transcript Vol. I at 170.

This testimony was not rebutted. BellSouth witness Bonnie O'Bannon, BellSouth's sole witness on the history and policy of Lifeline, did not have sufficient knowledge to deny that the cost of funding Lifeline was implicitly included in BellSouth's rates:

Q. Mr. Hickerson specifically testified that the cost incurred by BellSouth to fund the Lifeline program was implicitly included in BellSouth's revenue requirement during the 1993 rate case. Do you have any reason to disagree with that?

A. I don't know that much about that.

Transcript Vol. III at 552-53, April 13, 2000; see also Vol. III at 575 (Q. Does that mean you don't know what happened in the 1993 rate case? A. Right.).

In addition, Mr. Hickerson testified, Vol. I at 134, that in a letter from BellSouth regarding its Lifeline tariff to Austin Lyons of the TRA, dated November 14, 1997, BellSouth informed the TRA that the impact on revenues would be neutral:

Link-up and Lifeline provide negative impacts to Tennessee's revenue levels. However, the increased federal credit amounts will be reimbursed from the federal universal service support mechanism. Since no change in current demand levels is anticipated and the state credit amount is not increasing, the effect on current revenues will be neutral.

BellSouth Letter, November 14, 1997, Attachment A at 3, Collective Exhibit 1. Thus, BellSouth has itself acknowledged that the state Lifeline credit is reflected in BellSouth rates.

Ms. O'Bannon did state that there was no explicit fund from which the \$3.50 state credit came. She was, however, unable to state exactly where it did come from if not from BellSouth's rates:

CHAIRMAN MALONE: And it just comes from the earnings of BellSouth from its other services?

THE WITNESS: I don't know exactly where it comes from. I know there is not anything

explicit that it comes from, such as the old deferred revenue fund or intrastate universal service fund.

Transcript Vol. III at 618.

BellSouth's position is that it need only provide the \$3.50 credit to Lifeline customers who receive service through BellSouth. But if that is the case, then it is highly unlikely that Lifeline customers of resellers will receive the \$3.50 credit.

BellSouth, of course, contends that customers of resellers can receive the \$3.50 credit if the resellers will just pay it themselves. But realistically, how is it to be expected that a reseller to credit-challenged customers can generate enough profit to fund a \$3.50 credit? BellSouth generates its \$3.50 credit from a customer base of approximately 2.7 million. How can it be expected that a reseller such as Discount can generate a \$3.50 credit from a customer base of approximately 4,500. See Discount Response No. 1 to Consumer Advocate Division Petition for Information. This is like expecting the food stamp program to be financed by a tax on the persons who use food stamps to purchase food.

Significantly, the FCC has recognized that it is perfectly proper for states to use incumbent local exchange companies (ILECs) such as BellSouth to fund the state credit portion of the Lifeline program. Thus, in Paragraph 361 of the Federal Communications Commission's Universal Service Report and Order, 97-157, May 8, 1997, the Commission stated as follows:

The Joint Board observed that many states currently generate their matching funds through the state rate-regulation process. These states allow incumbent LECs to recover the revenue the carriers lose from charging Lifeline customers less by charging other subscribers more. Florida PSC points out that this method of generating Lifeline support from the intrastate jurisdiction could result in some carriers (i.e., ILECs) bearing an unreasonable share of the program's costs. We see no reason at this time to intrude in the first instance on states' decision about how to generate intrastate support for Lifeline. [Emphasis added.]

Note that the FCC has clearly considered the argument that using ILECs to generate the state credit may result in what the ILECs may view as ILECs “bearing an unreasonable share of the program’s costs.” That is, situations will exist where the ILEC is not reimbursed from some other fund or given a tax credit, as BellSouth witness Bonnie O’Bannon testified was the case in North Carolina. Transcript, Vol. III at 533 (Q. In North Carolina BellSouth provides a \$3.50 credit to the end user, but it gets a dollar-for-dollar credit on its taxes; correct? A. Again, it provides a \$3.50 to the reseller and gets a dollar-for-dollar credit.). The present form of ILEC funding in Tennessee, therefore, is not a sufficient reason for an ILEC to argue that it has no responsibility to pass through the \$3.50 credit to resellers.

In fact, the situation in Tennessee is analagous to that in Mississippi where resellers do receive a \$3.50 credit. In Mississippi, as Ms. O’Bannon testified for BellSouth, “BellSouth’s current rates assume recovery [of the state credit] from other retail customers of the amounts of revenue it waives in this case.” Transcript, Vol. III at 525 (citing Mississippi Arbitration Order, Hearing Exhibit 12). As shown above through the testimony of Mr. Hickerson for the Consumer Advocate Division, Tennessee has also built the cost of Lifeline service into the rates of BellSouth. Simply put: (1) Tennessee has set up a state credit that is funded by ILECs; (2) the FCC has said that that is acceptable; (3) if BellSouth is unhappy with this method of funding it should petition the TRA for change.

Finally, the Consumer Advocate Division maintains that, contrary to BellSouth’s arguments, the “filed rate doctrine” does not preclude the TRA from ordering BellSouth to pass through the \$3.50 credit to Discount from the beginning of the contractual relation between the two parties. This is so because the \$3.50 state credit is subject to control by the TRA, not

BellSouth. Even though there is no separate fund for the state credit in a bank or on a balance sheet somewhere, there is a fund in the sense that the TRA ordered the payment of the credit by ILECs and allowed them to build that cost into their rates. Thus, although BellSouth collects the \$3.50 credits, BellSouth is subject to TRA control; in effect, BellSouth is the instrument chosen by the TRA to collect and distribute the credit, acting as a kind of trustee or administrator. Accordingly, no matter what the BellSouth tariff states, the TRA, not BellSouth, has the ultimate authority over the state credit program that the TRA ordered. The TRA, therefore, can order the full payment of the \$3.50 credit to Discount without violating the filed rate doctrine.

Furthermore, since the BellSouth Lifeline tariff is in conflict with the FCC Lifeline Order (as Mr. Hickerson testified, Vol. I at 159), it should be held void ab initio insofar as it attempts to restrict the passing through of the \$3.50 credit to resellers. See, e.g., Brookhaven Cable TV v. Kelly, 573 F.2d 765 (2nd Cir. 1978), where it was held that the FCC has the authority to preempt state and local price regulation of special pay cable television programming, and that conflicting state and local laws are invalid. In the present case, the FCC has preempted the field of Lifeline support in setting the amounts that low income persons are entitled to if state decides to participate in the Lifeline program. Thus, for example, a state could not choose to participate in the Lifeline program, but then pass a law declaring that only half the federal support received would go to Lifeline users, with the other half going into a general universal service fund. Accordingly, since the BellSouth tariff conflicts with FCC rules, it is void ab initio and the filed rate doctrine does not apply.

Accordingly, the TRA should find that the \$3.50 state credit has already been paid by BellSouth ratepayers and should be passed through to resellers.

III.

THE FCC HAS EXPLICITLY STATED THAT WHEN RESELLERS PURCHASE LIFELINE SERVICE THAT PRICE SHOULD INCLUDE "LIFELINE SUPPORT AMOUNTS" WHICH CAN BE PASSED THROUGH TO CUSTOMERS, NOT JUST PARTIAL SUPPORT AMOUNTS

The FCC has held that when resellers purchase service at wholesale rates those rates should include Lifeline support amounts which will be passed through to Lifeline customers:

Resellers therefore could obtain Lifeline service at wholesale rates that include the Lifeline support amounts and can pass these discounts through to qualifying low income customers.

FCC Universal Service Report & Order, 97-157, May 8, 1997 at Paragraph 370.

The meaning of the FCC's Order is clear: the price at which a reseller such as Discount purchases service from a retailer such as BellSouth should include all Lifeline discounts, not just those favored by BellSouth.

This statement by the FCC that resellers should receive services at wholesale rates that include the Lifeline support amounts is consistent with the FCC's general rule that resale prices should be the same as those of incumbents less the discount. Thus, the FCC's rule on resale pricing provides as follows:

The wholesale rate that an incumbent LEC may charge for a telecommunications service provided for resale to other telecommunications carriers shall equal the incumbent LEC's existing retail rate for the telecommunications service, less avoided retail costs.

47 C.F.R. § 51.607(a).

BellSouth's tariff on Lifeline service provides that BellSouth will provide Lifeline service to qualifying customers at a price of \$10.50 off BellSouth's regular rate. Tariff Section A.3.31.1. On the same tariff page, however, BellSouth states that it will provide Lifeline service for resale

at only \$7.00 off the regular rate, that is, without the \$3.50 from the state credit. This failure to treat resellers as it does its own customers is an obvious case of discriminatory pricing and violates the FCC rule.

Furthermore, Mr. Hickerson of the Consumer Advocate Division testified that BellSouth's practice of charging a reseller a higher price than it charges its own customers violated the principle of "economic indifference" that is at the heart of the resale system. Transcript Vol. I at 140-41. Under the principle of economic indifference, a selling company such as BellSouth should be "economically indifferent" as to whether it sells service at a retail or a wholesale rate because the discount received by the reseller represents "avoided costs" that BellSouth did not incur because it was dealing with a wholesale buyer. In the present case, however, BellSouth avoids costs because it is dealing with a reseller, Discount, but BellSouth still charges Discount a higher rate than it does its own customers:

Q. Mr. Hickerson, should Bell--I mean, if the avoided cost rate is accurately set at 15--at 16 percent, should the incumbent carrier be economically indifferent as to whether it sells to a wholesaler--whether it sells to an end user or whether it sells to a reseller?

MR. TURNER: I think I'm going to object, Mr. Chairman. I believe he's the regulatory witness, but that sounded an awful [lot] like an economic question to me, and I'm not sure he's qualified to answer that.

CHAIRMAN MALONE: Well, I think Mr. Hickerson's background well qualifies him to answer that question.

THE WITNESS: From an accounting point or lay standpoint it should make no difference because Bell should receive the--you know, that same amount because the avoided cost is what--you know, they do not incur the costs, therefore, they should make no difference if they sell to a reseller or if they sell directly to an end user.

Transcript Vol. I at 140-41.

At the hearing, BellSouth witness Bonnie O'Bannon stated that it was the responsibility

of the reseller, not BellSouth, to provide the \$3.50 to its customers. Hearing Transcript, Vol. III at 606-07, April 13, 2000. This position, however, overlooks the fact that offering services for resale at a higher rate than it charges its own customers violates the FCC order on resale pricing. Accordingly, BellSouth should flow through all Lifeline support amounts, not just those it chooses.

IV.

IF THE \$3.50 STATE PORTION OF THE LIFELINE CREDIT IS NOT PASSED THROUGH TO RESELLERS, A PORTION OF THE FEDERAL FUNDS MAY BE LOST TO TENNESSEE

The Lifeline support amount has both a state and federal component. The federal component consists of (1) \$5.25; and (2) an additional \$1.75, so long as the state matches this amount. Paragraphs 350 and 351 of the Federal Communications Commission's Universal Service Report and Order, 97-157, May 8, 1997. The state component consists of the \$3.50 state credit at issue in this case. The total available Lifeline support amount, therefore, is \$10.50 ($\$5.25 + \$1.75 + \$3.50 = \10.50). If, however, the \$3.50 state portion is not passed through to resellers, the FCC has made it clear that the federal \$1.75 is at risk.

In footnote 891 to Paragraph 353 of the FCC Universal Service Order, the FCC stated as follows:

891. Under our new plan, low-income consumers will receive the full \$10.50 in support if their state provides \$3.50 in intrastate support, as now occurs in 44 jurisdictions.

The obvious meaning is that the FCC intends for consumers to receive the full \$10.50 if the state provides a \$3.50 credit, which Tennessee does. See also Footnote 926 to Paragraph 368 of the FCC Universal Service Order ("If the state-mandated Lifeline rate does not reflect a reduction in

a CLEC's rate equal to the applicable federal support amount, the federal support amount will be reduced accordingly to avoid double recovery.”).

Witness Bonnie O'Bannon of BellSouth acknowledged that the failure of a Lifeline customer to receive the \$3.50 credit when that person is a customer of a reseller could put the Tennessee Lifeline program at risk:

Q. So if the 3.50 is not passed through by a reseller, it could jeopardize the entire Tennessee Life-Line program to the tune of \$1.75 for each customer; is that correct?

A. I think there's that possibility.

Transcript Vol. III at 641.

The TRA, therefore, should ensure that Tennessee's Lifeline program continues to receive full funding and order BellSouth to pass through the \$3.50 state credit to resellers.

THE DIRECTORY ASSISTANCE ISSUE

BELLSOUTH SHOULD BE REQUIRED TO OFFER FREE, TRULY VOLUNTARY TOLL BLOCKING, INCLUDING THE BLOCKING OF DIRECTORY ASSISTANCE, TO LIFELINE CUSTOMERS

The FCC has clearly stated that Lifeline customers should receive, without charge, toll-limitation services. FCC Universal Service Report & Order, 97-157, May 8, 1997 at Paragraph 385. After a fixed number of calls, directory assistance is now a toll charge service in Tennessee. Accordingly, BellSouth should be required to offer free, truly voluntary toll blocking, including the blocking of directory assistance, to Lifeline customers.

Paragraph 385 of the FCC's Universal Service Order provides as follows:

385. We further agree with the Joint Board's recommendation(979) and many commenters' suggestions (980) that Lifeline consumers also should receive, without

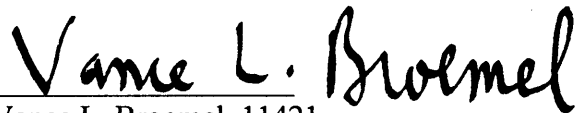
charge, toll-limitation services. **As the Joint Board observed, studies demonstrate that a primary reason subscribers lose access to telecommunications services is failure to pay long distance bills.**(981) Because voluntary toll blocking allows customers to block toll calls, and toll control allows customers to limit in advance their toll usage per month or billing cycle, these services assist customers in avoiding involuntary termination of their access to telecommunications services. The Joint Board concluded, however, that low-income consumers may not be able to afford voluntary toll-limitation services in a number of jurisdictions.(982) Therefore, like the Joint Board, we are confident that providing voluntary toll limitation without charge to low-income consumers, should encourage subscribership among low-income consumers. Our conclusion is based, in part, on the success of toll limitation in states such as Pennsylvania, which boasts one of the nation's highest subscribership rates.(983) Customers of Bell Atlantic-Pennsylvania may receive toll limitation without charge when initiating telephone service or when, after toll service has been terminated for non-payment, they pay all outstanding charges and request such service.(984) Furthermore, we find that toll-limitation services are "essential to education, public health or public safety"(985) and "consistent with the public interest, convenience, and necessity"(986) for low-income consumers in that they maximize the opportunity of those consumers to remain connected to the telecommunications network.

Accordingly, the TRA should order BellSouth to offer free, truly voluntary toll blocking, including the blocking of directory assistance, to Lifeline customers.

CONCLUSION

For the foregoing reasons, the Tennessee Regulatory Authority should find that: (1) the \$3.50 state credit for Lifeline should be passed through to resellers; and (2) BellSouth should be required to offer free, truly voluntary toll blocking, including the blocking of directory assistance, to Lifeline customers.

Respectfully submitted,



Vance L. Broemel, 11421
Assistant Attorney General
Consumer Advocate Division
Cordell Hull Building, 2nd Floor
425, 5th Avenue North
Nashville, Tennessee 37243-0500
(615)-741-8700

Certificate of Service

I hereby certify that a true and correct copy of the Post Hearing Brief was served on parties below via U.S. Mail, postage prepaid, this May, 12th, 2000.

Guy Hicks, Esquire
BellSouth Telecommunication, Inc.
Suite Room 2101
333 Commerce Street
Nashville, Tennessee 37201

Henry Walker, Esquire
Boult, Cummings, Conners & Berry
411 Union Street
Suite 1600
Nashville, Tennessee 37219

Vance L. Broemel
Vance L. Broemel